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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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This writ of certiorari is proposed by the defendant in the court below (petitioner herein) to review a judgment entered against the United States for Twenty Five Thousand Dollars (\$25,000). These damages were fixed for the taking by the government of that part of a dam owned by the plaintiff in the court below (respondent here). The damages recovered are for only part of the dam taken above ordinary high water mark. The judgment is based upon special findings (Tr. 19-21) and an opinion (Tr. 21-25) which cover in detail the process by which the Court of Claims arrived at its conclusions. Eleven errors are assigned (p. 7-8). All of them reflect the unwillingness of the

government to accept the Court of Claims' findings on disputed issues of fact or disagreement with the Court's findings as supported by the undisputed proof. (Herein reference to the "Printed Transcript of the Record" will be made as (Tr. ----), to the remainder of the record as yet not printed as (R. ----), and to the petition for writ of certiorari as (P. ----), in each case followed by the page number referred to. For convenience of reference and to make sure that the parts referred to are properly identified, we reproduce the principal oral evidence relied upon in this brief as an appendix. This procedure is deemed necessary because the record is somewhat involved as a result of the failure of the petitioner to include a vast amount of material parts in its request for the record to be included herein, thereby compelling respondent to supply such parts by an independent designation. The result is that part of the evidence to be relied upon appears in petitioner's designation, and the remainder in the respondent's designation.)

The single ground urged why this writ should be allowed is urged upon unsupported assertions of what the facts show and erroneous theories of the import of the cases relied upon

To support the "reasons for granting the writ", (P. 8), the statement is made that the Court of Claims held the government liable for damages for impairment of the power potential of respondent's power plant. Then it is said that "it (the Court of Claims) has done so although none of the respondent's fast lands were invaded, or its physical property taken or destroyed".

Petitioner has not read either the record or the decision carefully. The claim for damages was founded and the court allowed damages for taking of approximately three feet of head of respondent's dam (Tr. 20, Par. 5) and similar areas of plaintiff's

land on either side of the tailrace and power house and gates of the dam. (Exh. 22 & 23, Witness Eckberg R. 238 and 430-431, Exh. D-2, Exh. E-1, E-2, E-3. Note particularly the difference between water levels in Exh. D-2 and Exh. E-1, E-2, E-3, and Exh. 22 & 23, and the areas of land affected as shown by this comparison. The appendix assembles and explains the evidence in detail.) The value of plaintiff's enterprise was reflected by the principal use of the water power, that is, generating capacity. Plaintiff's loss was measured by the cost of reproducing the cheapest available substitute. (Tr. 25) The record demonstrates what is apparent from anyone's knowledge of the use of water.

It seeks its level. When the level was raised three feet above ordinary high water mark, the water spread to the height of three feet through plaintiff's turbines and hydraulic equipment, and likewise raised to an equal height along the fast land leading to the dam along both ends of the power house and spillway. (Exh. 22, 23, Eckberg R. 238 and 430-431. Schultz R. 77, 78, questions 496-501, 346 and 347, questions 504-509.) The plaintiff's experts testified that damages and method of measuring damage was related to the generating capacity lost by the reduction in, or loss of head. (R. Ackerman 142, q. 136; Meyer 375-379.) That evidence was not in dispute, and as indicated above, contrary to the allegations of the petition herein, showed that "fast lands" of the plaintiff "were invaded" and plaintiff's "physical property" was "taken or destroyed". The Witness Hooper produced Exhibit 8, a map showing the area in the vicinity of the dam in question. Upon this map was shown the meander line of the St. Croix River. This meander line passes outside of and westerly from the spillway and power house of respondent's dam about fifty feet when the scale of the map is applied to the area between the spillway, power house, and the meander line. The only claim that is made by the government is that a guide wall from the tailrace of respondent's dam extends outward from the power

house a distance of thirty-four feet. (R. 152-153) Thus the only evidence in the record (in fact the government's witness Eckberg, R. 238 and 430-431, and Hooper, R. 152-153, support the conclusion as does Exh. 8 offered by the government) shows that not only did the government appropriate the "lower portion of the (our) draft tubes and the two generators we are using and the land below the dam across the Willow River (R. 346-347) but the company has been dispossessed of land below elevation 676 m. s. l." (R. 346-347, Schultz. The evidence is reproduced in the appendix.)

Thus, though counsel claim the court found a taking without evidence to support the conclusion, examination of the record discloses *all* the evidence in the record showed an invasion of three feet of plaintiff's land above ordinary high water mark at the dam and the approaches to it, and a consequent taking. However, petitioner's entire argument for allowing the writ herein is founded upon this erroneous premise. Thereby is destroyed every reason for allowing the writ because the premise on which the application rests is unfounded.

The remainder of the argument (P. 10-15) proceeds from this erroneous premise, and then confuses the effect of the evidence and the law. On page 11 the argument is made that the plaintiff's only damage consists in "raising the level of the St. Croix River into which its draft tubes discharge". Petitioner then continues, "Respondent's claim is thus based upon the asserted right to flow in a state of nature of a navigable river, the St. Croix." This claim is unsupported by the record as pointed out above. The plaintiff was careful to eliminate all claims for damages below ordinary high water mark. Its evidence was carefully directed toward proving damages only above ordinary high water mark, and the court carefully distinguished such damages and allowed recovery only for the taking above ordinary high water mark, that is, for the three feet of head between elevation 672

and 675 m. s. l. (Tr. 21, Par. 6) In the opinion the Court of Claims emphasized the basis for its finding and the care taken by the court in fixing the point where liability for the taking began. (Tr. 23-24) It said:

"Liability of the defendant, therefore, depends upon whether or not the level of the St. Croix River was raised above ordinary high water mark. It had a right to raise the level of the river to ordinary high water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point."

There is absolutely no evidence that the draft tubes or any other part of the plaintiff's dam was in the bottom of the St. Croix River, or that the tailrace was in the bottom of the river. (R. 46, Exh. 22, 23, Exh. D-2, Exh. E-2.) A similar claim was made before the Court of Claims on petitioner's proposed findings, but that court denied the contention upon the evidence of these exhibits and the parts of the transcript referred to above. (See brief attached to our motion objecting to motion not to print record.) The draft tubes have absolutely nothing to do with this issue. It is the head of water produced by the raising of the government's dam three feet above ordinary high water mark that causes the damage, because by that process respondent's power is destroyed as petitioner concedes (P. 5) when it says:

"Hence * * * any raising of the level of the St. Croix River at Hudson proportionately reduced the power head at respondent's dam."

Nor did the Court of Claims hold that "a riparian owner has as against the government (the right to a flow of the river as in a state of nature) such a right to the flow of a navigable river as to entitle him to compensation". (P. 10) Except as to the flowing above ordinary high water mark, the plaintiff did not make such a claim. It claimed only damages above the ordinary high

water mark, and the Court of Claims allowed damages to only that extent.

United States v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592, 597-598, sustains the judgment in this case. In that case the Court merely held that as to property located in the bed of a navigable stream there could be no recovery. Thus it said, pp. 596-597:

"The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

It, therefore, did not disagree with the conclusion of the *Lynah Case* to the extent that that case allowed damages for a taking above ordinary high water mark. (p. 598) It only disagreed with the failure of the *Lynah Case* to distinguish between the right of the government in the stream up to ordinary high water mark, an absolute right without liability for compensation, as the Court of Claims declared in this case (Tr. bottom of page 23), and its right to appropriate adjacent property above ordinary high water mark, a right to be acquired only upon payment of just compensation. Therefore it said:

"But we think this Court has never followed it (*Lynah Case*) as a binding decision that compensation is due for injury or destruction of a riparian owner's property located in the bed of a navigable stream. And we think that, so far as it sanctions such a principle, it is in irreconcilable conflict with our later decisions and cannot be considered as expressing the law."

U. S. v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592, 598.

The entire difficulty of petitioner here is it started out on the unsupported premise described above, that plaintiff's dam was in the bed of the St. Croix River. Being in error in that respect, the remainder of its argument, of course, is also unsupported.

The jurisdiction of this Court to review the record in the Court below arises only when it is shown that:

" * * there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."*

Federal Code Annotated, Vol. 8, Title 28, Sec. 288,
as amended May 22, 1939, Chapter 140, 53
Stat. 752.

Here, as pointed out above, the only evidence in the record shows conclusively that petitioner's claims are unfounded, and that the Court of Claims upon all the evidence found that plaintiff's "power plant was located near the confluence of the Willow River and the St. Croix River, in the City of Hudson, Wisconsin, on land owned by it above ordinary high water mark of the St. Croix River". (Tr. 19)

It is, therefore, respectfully submitted that the petitioner has failed to make a case for a writ of certiorari.

Respectfully submitted,

R. M. RIESER,
JOHN WATTAWA,
Attorneys for Respondent.

APPENDIX

APPENDIX TO SUPPLEMENT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

181. Q. In Exhibit "D-2" there are some sort of darker spots throughout the area toward the bottom of the picture that look like stumps. Is that what they are?

A. Yes, they are old tree stumps on the floor of the reservoir above the St. Croix dam.

182. Q. Then the area toward the bottom of Exhibit "D-2" is part of the old reservoir—or reservoir?

A. All the area from the plant as far as the picture shows is part of the floor of the old reservoir.

183. Q. And what was the size of some of those stumps?

A. Oh, two and one-half feet in diameter, eighteen inches to two and one-half feet in diameter.

Schultz, R. 280, 281.

184. Q. Is it true that the dam that you now use has a spill-way, that you have described here earlier in the testimony, is to the left of this picture "D-2", is that right?

A. Yes. Some distance to the left.

185. Q. That is the part that is used as a spill-way that is built across the Willow river itself, is that right?

A. Yes, only we don't use it as a spill-way. There is a gate there, but we haven't had it open for years.

186. Q. Now, I show you Plaintiff's Exhibit "E-1" to "E-4", inclusive, and ask you, first of all, when those were taken?

A. They were taken on April 5, 1942.

187. Q. Did you take those?

A. Yes.

188. Q. Do they reflect the conditions they purport to show as of about that date?

A. Yes.

189. Q. And are taken of the area involved in this proceeding, is that right?

A. Yes. The power house shown on a number of the pictures is the St. Croix plant power house.

190. Q. And the rest of them show the St. Croix river near its mouth?

A. The Willow river below the dike across Willow river. And the other one shows the direction of the river to the interstate bridge, although the channel of the Willow river is flooded out.

191. Q. Exhibit "E-2"?

A. It shows the results from the main railroad of the Chicago & Northwestern along the west bank of their embankment at the St. Croix plant.

192. Q. And shows the St. Croix plant, does it, in the distance, right in the immediate center of the picture?

A. Yes, power house and gates.

193. Q. Exhibit "E-1", what is that? From what direction of the dam is that shown?

A. That was taken from the north and looking southwest toward the Hudson passenger depot. You can see the depot in the extreme right hand of the picture, the water tower at the other, and then the east boundary of Lake St. Croix, or the St. Croix river, around to the dike at the power house.

194. Q. Is it true that the dam would be beyond the foot of the picture here, is that right, if continued?

A. The one across the Willow river, yes. The tainter gates are shown right adjacent to the power plant building, with the hoist in the left-hand side of the picture.

195. Q. (By Mr. Cox) The object there which projects into the St. Croix river, just about the center?

A. I would say that that is the north wall of the flume coming out of the power house.

196. Q. (By Mr. Cox) And extending into the St. Croix river?

A. Yes.

197. Q. (Mr. Rieser continuing) And that was taken at a time when the St. Croix river was at elevation 676.6, is that right?

A. That may be a little deceiving for that reason. The water is high on that projection, but that is the north wall of the flume permitting the water from the water turbines to get out into the lake.

198. Q. Exhibit "E-1", is it true it looks downstream from—down the St. Croix from your dam, is that right?

A. Yes, the view is taken toward the southwest.

199. Q. And Exhibit "E-2" is looking up toward the dam, along the same area, is that right?

A. Yes, it is almost looking north.

Exhibit "E-1" offered and received.

200. Q. In connection with your operation of the St. Croix dam prior to the building of the Red Wing dam, were you in the habit of observing and did you know about how, under normal conditions, the water discharged into Lake St. Croix or the St. Croix river?

A. Yes.

201. Q. And as a matter of fact, had you—when water was very low, what was the lowest elevation that you had observed in years prior to—say during the ten years prior to 1938—on the St. Croix river?

A. The lowest surface water on Lake St. Croix was 666. I don't remember whether it was .5 or .6 or .7—somewhere along in there. A fraction above 666.

202. Q. And what is the occasion for you remembering that elevation? Did you have to do something in connection with your operation there to—

A. I don't recall at present any specific thing that we were doing. We had repairs at the St. Croix plant a number of times.

203. Q. Did you extend this flume any at that time, or about that time?

A. The particular work connected with the low stage was the water wheel draft tubes were out of the water so that we couldn't get good operation and we had to extend them down to a lower level.

204. Q. Now then, that, you would say, was the lowest stage of water during your operations there?

A. The lowest that I have any definite knowledge on, yes.

Schultz, R. 18-21.

379. Q. Mr. Schultz, your St. Croix power house and a wing wall extends out therefrom to the westward, extend towards the St. Croix river, do they not?

A. Yes, the wing wall is only on the north part of the gate section.

Schultz, R. 31.

(Exhibits D-2 and E-1 and E-2 should be compared at this point to note that when they were taken the elevation on D-2 was before the Red Wing dam was raised, and E-1 and E-2 were taken when the dam was at elevation 676.6 or only slightly over the elevation maintained by the Red Wing dam which was 675. These photographs and this testimony should also be considered in connection with Exhibits 22 and 23.)

496. Q. Did the government take and occupy or does it now use or did it ever heretofore use any part of your power house, machinery or equipment?

Mr. Rieser: If you confine that to use, I will not have any objection. But if you say "take, occupy and use" I must object as a legal conclusion or it includes a legal conclusion.

Mr. Cox: Very well.

497. Q. Does it occupy or did it ever occupy your power house or any of the equipment therein?

A. It destroyed the use—

498. Q. I am not talking about destroying. I want to know whether the government ever physically occupied—

A. Not the power house, no.

Mr. Rieser: The question included also some of your other equipment in the power house.

499. Q. Or did it ever occupy or use any of your equipment or machinery in the power house?

A. The only portion would be the draft tubes, to my mind, that they probably did occupy. As far as the instruments in the power house goes, no.

500. Q. You mean the draft tubes there may have been submerged by water?

A. Yes, and it occupied it so we couldn't make use of it.

501. Q. But it never used it, did it, the government never used your draft tube?

A. Not to run water through, no.

Schultz, R. 77-78.

504. Q. Whether you have ever been physically ousted of any of your property there, of your land or of your power house or the machinery therein?

A. I would say we were ousted from the land and the use of our machinery, as I understand the word "oust" for the property that we have been making use of.

505. Q. I am using the word "oust" in the sense of being dispossessed?

A. Yes, I would say yes.

506. Q. Very well, now what part of your land, power house, or machinery have you been dispossessed or ousted?

A. I would say we have been dispossessed of the lower portion of our draft tube and the two generators we are using, and of the land below the dam across Willow river.

507. Q. In what way? In what manner?

A. That we can't use it. It is flooded so that we can't get down on that land.

508. Q. Have you been dispossessed or ousted of any land below elevation 676?

A. Yes.

509. Q. What part?

A. This same part that I referred to before. That is the only land that we have—

Schultz, R. 346-347.

586. Q. And the notation on Exhibit 23 with respect to the effect of the normal pool stage being indicated. What do you understand by that reference?

A. There is a well-defined mark on the rip-rap of the bank and also, of course, the structure.

587. Q. You mean the light area?

A. The light area is below the mark. The mark is rather dark. The Commissioner: What does the mark mean?

A. That mark was made by the water of the pool standing at its normal pool elevation.

588. Q. That is, the light part is between the mark and the surface of the water?

A. Yes, it is somewhat light there.

Eckberg, R. 238.

589. Q. And then there is an indication also along the edge of the water of the effect of wave action on the rip-rap to some extent, sort of a line there?

A. No, I can't say that is the effect of wave action. I don't doubt there has been some wave action, but I can't say from the mark.

590. Q. Isn't there a distinct indication of a wearing out there right on the upper line of that rip-rap?

A. No, I can't say so from the photograph. There may be some disturbance of the rip-rap from the water, but the photograph does not indicate it clearly.

591. Q. Then you and I just don't see right the same way, but that is for anyone to examine. In other words, you would expect to find some wearing out after a year or two of wave action on that rip-rap, wouldn't you?

A. Well, I would on bare soil. I wouldn't expect to find much of a nick cut in that rip-rap. Sometimes there are small particles of material in the rip-rap that might wash out.

592. Q. And the ice action would, of course, have the same effect?

A. The ice would have a different effect, if it had any.

593. Q. It would tend to wear out that rip-rap faster than it would ordinarily wear out if it was just exposed to the air?

A. If there was expansion of ice in the winter time it might tend to force the rip-rap up.

594. Q. And would follow generally the level of the water along the bank there, is that right?

A. There is a very fine line there that shows the pool elevation.
Eckberg, R. 430-431.

(It will be noted that in comparing Exhibits D-2, E-1, E-2, and 22 and 23 that the effect of the increase of head by three feet

is quite clearly illustrated and moreover that the area of fast land taken is marked by the strip indicated and described by Mr. Eckberg above.)

Mr. Hooper (R. 146-157), head of the Survey Department of the United States Engineers Office at St. Paul, a witness offered by the government, testified that on the 17th day of June, 1942, a few days before the trial of this case, he was at Hudson, and as to the condition of the water in the vicinity of the company's property he testified as follows:

87. Q. What was the condition of the water?

A. Well, the water was flooding out the west edge of the company's property. The water of the St. Croix was on that portion of the dam that extends out.

88. Q. What are those long walls extending out below the tainter gates towards the river?

A. By below I take it you mean downstream from the tainter gates?

89. Q. Yes, below the tainter gates?

A. I don't know whether they have an official name. They are apparently some sort of guide wall.

90. Q. Built of what material?

A. Concrete. It confines the tailrace from the power house.

91. Q. And approximately how far out beyond the bank do those extend?

A. Well, I would guess—the defendant's exhibit shows that.

92. Q. Would you look at that exhibit and state approximately, as near as you can?

A. Defendant's Exhibit No. 8—I have to add some of these figures together—indicates it is thirty-two feet from the west face of the power house out to the edge of the westernmost crosswalk,

their walkway, and about two, and one-half feet farther to the end of the most westerly extent of the wall. That would be about thirty-four feet.

Hooper, R. 152-153.

Examination of Exhibit 8, when considered in connection with the scale of the map, indicates that even this witness's estimate as to how far the so-called guide wall extends out into the water still leaves the entire structure well within the meander line shown on the map. The guide wall is also pictured on Exhibits 22 and 23 and D-2 and E-1 and E-2, and shows very clearly that it is a part of the mainland and not within the river bottom as claimed.